ATTACHMENT A
PROJECT DISCUSSION

Background

The Use Permit portion of the application was initiated to resolve a code enforcement action resulting from the unpermitted removal of protected trees.

The site has a complicated history, involving several different permits obtained over a several year period:

On April 2, 2013, the applicant submitted an application for a Design Approval (PLN130239) to allow the construction of a new 3,200 square foot barn. The plans included with the Design Approval application did not reflect that trees were present in the development area or indicate that trees were being removed to allow the proposed barn construction. On May 15, 2013, the Design Approval (PLN130239) was approved administratively without knowledge that tree removal would be necessary to construct the barn.

On August 16, 2013, the applicant submitted a request for a construction permit (13CP01494) to allow the construction of the 3,200 barn. The plans did not reflect the trees present on site nor indicate that trees would be removed to allow the proposed development. On September 19, 2013, the construction permit (13CP01494) was issued.

On October 4, 2013, the applicant applied for a grading permit (13CP01799) to move 4,958 cubic yards of soil (1,263 cut/3,695 fill), including 2,432 cubic yards of imported fill. This quantity of imported fill, to create a building pad for the future house, resulted in fill slopes of approximately 8-10 feet. The plans submitted for the grading permit did not reflect the trees present on the property or indicate that trees were being removed to allow the grading. On January 16, 2014, the grading permit was issued.

On April 30, 2014, the applicant applied for a Design Approval to allow the construction of a new 7,200 square foot residence, 1,200 square foot Accessory Dwelling Unit (ADU) and demolition of an existing 1,200 square foot residence. During the review of the Design Approval application it was discovered that un-permitted removal of protected trees had occurred throughout the entirety of the site, including in the locations of the previously approved barn (PLN130239) and the areas proposed for development of the new residence and ADU.

Subsequently, on July 2, 2014, a code enforcement case (14CE00183) was opened on the subject parcel, relative to unpermitted removal of protected trees (Oaks and Monterey Pines). The Monterey County Code states that restoration of unpermitted tree removal should be pursued unless it can be demonstrated that restoration is not feasible. Specifically, Monterey County Code Section 21.84.130, states that "*no application for a discretionary land use permit shall be deemed complete, when there is a violation on the property related to grading, vegetation removal or tree removal, until that property has been restored to its pre-violation state. Furthermore, alternatives to the restoration requirement shall not be considered unless the applicant can show that restoration would endanger the public health or safety, or that*

restoration is unfeasible due to circumstances beyond the control of the applicant or the property owner."

Furthermore, Monterey County Code Section 16.08.230, pertaining to grading provides that "*The Building Official may, in writing, suspend or revoke a permit issued under provisions of this Chapter whenever the permit is issued in error or on the basis of incorrect information supplied, or in violation of any ordinance or regulation or any of the provisions of this Chapter."* The grading permit issued to authorize the site grading was based on an application that failed to adequate depict that trees would be removed in the areas proposed for placement of large quantities of fill. Additionally, the plans submitted with the application appear to have altered the existing site topography site, in an effort to show that the slopes on site were less than actually on-the-ground.

In this particular case, the applicant has moved approximately 4,958 cubic yards of soil (1,263 cut/3,695 fill), including 2,432 cubic yards of imported fill on the site in the areas of the unpermitted tree removal. Normally, restoration would involve restoration of natural grades and replanting of trees which have been removed. In this particular case, the applicant moved a total 3,695 cubic yards of fill (2,432 imported) throughout the site and did not want to remove the fill and restore the site. The applicant desired to apply for an after-the-fact permit for the removal of the trees. All outstanding permits were tied together as part of this application as a Combined Development Permit.

A Forest Management Plan (FMP) was prepared to assess the impacts resulting from the un-permitted removal of protected trees, assess the overall health of the remaining trees on site, and determine the appropriate/replanting requirements for the subject site. Subsequent to the FMP, an Initial Study/Negative Declaration was prepared to analyze potential impacts resulting from unpermitted removal of trees, extensive amounts of grading, and the proposed construction of the new single family dwelling and accessory dwelling unit.

The Initial Study (State Clearinghouse No. 2014121086) was circulated for public review from December 24, 2014 to January 26, 2015 (34 days). The primary issues analyzed include Biological Resources and Hydrology/Water Quality. The IS/ND identified mitigation measures which could be implemented to adequately reduced tree removal impacts, and recommended partial restoration/replanting of portions of the site which were not proposed for future development or had previously been developed.

Comments on the IS/ND were received from individuals who reside within the vicinity of the project site. The comment letters expressed concerns over the placement of large quantities of fill, the altered drainage pattern of the project site, the large amounts of removed trees, and questioned if adequate water could be supplied to the site to allow the construction of the proposed 7,200 sq ft main residence and 1,200 sq ft accessory dwelling unit.

Planning Commission Hearing

The project was brought to public hearing before the Monterey County Planning Commission on January 28, 2015. The Staff Report to the Planning Commission recommended approval, but identified that another option available to the Planning Commission was to deny the permit and

require restoration of the site (Attachment D). The Planning Commission received a significant amount of testimony from neighbors of the site, opposing the application and expressing concern with the grading, impacts on hydrology, the house design, lack of permits for tree removal, and lack of water available to this site.

During the hearing, the Planning Commission was very concerned about water use (at the hearing the application changed his proposal regarding use of an on-site well and Cal-Am connection), site drainage, and unpermitted tree removal. The Commission expressed concern with such a large house, with an accessory dwelling unit and finished barn being constructed within the Cal-Am service area, in light of the State Water Resources Control Board's Cease and Desist Order (CDO) on Cal-Am.

Water

The initial study discussed that water would continue to be provided by Cal-Am and that prior to issuance of building permits, the Water Resources Agency would require a completed Monterey Peninsula Water Management District Water Release Form. The Commission questioned how all this new construction would not constitute an increase in water use to which the applicant responded that only the accessory dwelling unit would receive water from Cal-Am, which is consistent with existing water use, and all new water use would come a well located on-site. A Commissioner expressed concern that this was an expansion of water use that was not adequately addressed in the Initial Study/Negative Declaration, because the IS/ND assumed no increase in water use and connection to Cal-Am. The records in both the Planning Department and Environmental Health Bureau confirm that the project site was being processed assuming connection to Cal-Am.

Violations

Additionally the Planning Commission was concerned by the cumulative disregard for the regulations and policies of Monterey County Code. The applicant submitted numerous permits (planning, grading, and construction) omitting the presence of large numbers of protected trees, removing those trees without appropriate permits, and grading which has the potential to adversely affect adjacent property owners by changing the drainage of the existing landscape. These facts were part of the evidence cited by the Planning Commission in its resolution.

Restoration

Pursuant to Monterey County Code Section 21.84.130, "*alternatives to restoration of the property shall not be considered unless the applicant can show that restoration would endanger the public health or safety, or that restoration is unfeasible due to circumstances beyond the control of the applicant or property owner*. In this particular case, the Planning Commission found that restoration is feasible and the findings for alternatives to site restoration were not supported.

While the Forest Management Plan (FMP) prepared for the project only offered partial restoration, this recommendation was based on the assumption that the location, size, and/or design of the proposed project (house and accessory dwelling unit) would not change. Under the plain language of the Zoning Ordinance, design of the project is not a reason to avoid or reduce the requirement of restoration.

Ultimately, the Planning Commission did not adopt the Initial Study/Negative Declaration, found that restoration was feasible, determined the project to be Statutorily Exempt per Section 15270(a) of CEQA (projects which are denied/rejected by a public agency), denied the Combined Development Permit, and found the Design Approval incomplete until full site restoration has been completed. This decision was based on the fact that the applicant had not supplied/included/depicted the appropriate/required tree removal on previously issued permits (Planning and Building), nor demonstrated infeasibility of the requirement for restoration.

Appeal

On February 17, 2015, Anthony Lombardo & Associates, on behalf of Paul & Linda Flores, appellant, timely appealed the Planning Commission's decision to deny the Combined Development Permit and find the Design Approval incomplete until restoration had been completed (Attachment C). The appellant requests that the Board of Supervisors grant the appeal and adopt a previously approved Negative Declaration, and approve the Combined Development Permit, including the Design Approval. The appellant contends the findings or decision are not supported by the evidence and the decision was contrary to law.

Pursuant to Monterey County Code, the appeal was set for hearing on April 14, 2015.

Appeal Contentions

The appeal alleges: the findings or decision are not supported by the evidence and the decision was contrary to law. The contentions are contained in the Notice of Appeal (Attachment B) and listed below with responses.

Contention 1 – The Findings or Decision are not supported by the Evidence.

The appellant contends that information contained in Evidence 2 (Inconsistency) is not correct because the Planning Commission found that the Flores application was inconsistent with the General Plan essentially because the site had not been restored to its pre-violation state. The appellant contends that under the circumstances of this particular case, the site is not required to be fully restored prior to the application being determined complete and heard by the Planning Commission. The appellant further contends that alternatives to restoration can be considered (pursuant to MCC 21.84.130) if the "restoration would endanger the public health or safety, or if restoration of unfeasible due to circumstances beyond the control of the applicant or the property owner". The appellant contents that restoration is not required because:

a) *A Forest Management Plan (FMP) was prepared and reviewed by the County and found to be adequate. Additionally, Page 3 of the Planning Commission staff report (discussion section) states "it was the opinion of the Forester, that full restoration of the project site would potentially involve significant environmental impacts, due to the placement/return of heavy grading equipment required to remove/relocate the vast quantities of fill placed and compacted onsite and recommended [and recommended] partial restoration (replacement planting) of the project site.*

Response:
Monterey County Code Section 21.64.260(D)(3), requires that applications (Use Permits) for the removal of more than 3 protected trees be accompanied by a Forest Management Plan (FMP), prepared by a qualified Forester, as selected from the County's list of Consulting Foresters. The preparation of the FMP for this project, as stated in the Planning Commission staff report discussion was completed to assist in the determination of remedial actions. The recommendations of the FMP and Forester were presented to the Planning Commission during the hearing. These recommendations do not bind the Planning Commission or the Board of Supervisors to a predetermined action.

The removal of three or more protected trees requires approval of Use Permit by the Monterey County Planning Commission [(MCC 21.64.260(3)(a)], and the purpose of the public hearing is to allow the appropriate hearing authority to receive information from the applicant, County staff, other agencies, and the public. In this particular case, the appropriate process was followed and the appellant was afforded due process.

The Planning Commission held a public hearing on the project and received information and presentations from county staff and the project applicant, followed by testimony and presentations from the public. Upon the close of the public hearing, staff responded to questions from the Planning Commission. Following these responses, the Planning Commission then discussed the facts and merits of all evidence received. The Planning Commission determined that full site restoration was feasible and in the control of the property owner, and would not endanger the health or safety of the public, and denied the Combined Development Permit, and ordered full site restoration.

b) Staff prepared an Initial Study/Negative Declaration, which was circulated through the State Clearinghouse and locally. During the review of the IS/ND, no evidence was submitted to contradict staff's determination regarding restoration.

Response:
The purpose of preparing an Initial Study/Negative Declaration is to analyze potential impacts from the proposed project. The baseline (starting point of evaluation) for the environmental review document includes the violation (unpermitted tree removal) and prior grading activities.

The contention that evidence (comments) were not presented during the public circulation period of the IS/ND is not accurate. Staff received comments from neighbors expressing concerns over potential impacts from mass removal of trees, large quantities of grading, and development of a large house. Specifically, the neighbors expressed concerns over the potential of increased site run-off (drainage/flooding), use of additional groundwater (lowering of groundwater levels), and soil erosion (exposed areas of soil). The comments expressed by the neighbors requested that the site be fully restored prior to so a full scope of potential impacts could be completed, and not have the baseline for evaluation include the on-site violations. These same concerns were presented to the Planning Commission.

The appellant is correct in stating that no public agencies submitted comments on the IS/ND. However, this does not restrict the Planning Commission from considering the facts of the case, or information presented by the public.

In this particular case, the Planning Commission decided the to deny part of the project and hold the remainder incomplete, which does not require adoption of the IS/ND. The Planning Commission also found that restoration would not endanger public health and/or safety and that full site restoration was appropriate under the standards of Title 21.

c) *The determination regarding restoration rests with the Department (Planning), not the Planning Commission. The appellant cites a 2004 memorandum addressing the question of who may approve an alternative to restoration. That memo states, "alternatives to restoration plan may only be approved by the Director, Chief Assistant Director, or Assistant Director." The appellant contends that the Director made the determination regarding restoration based on the forester's recommendation, and there was no appeal filed regarding the determination. Therefore, the issue of restoration was not properly before the Planning Commission.*

Response:
The appellant contends that the decision relative to site restoration was not appropriately before the Planning Commission, and such decision is lies within the discretion of the Director of Planning. Restoration can be approved by Staff. The applicant/appellant chose not to restore, but requested an after-the-fact Use Permit to allow tree removal. The Planning Director processed the request to allow the after-the-fact tree removal for consideration by the Planning Commission, who is the appropriate authority to consider such a request. The Planning Commission found applicant had not made the required showing to enable consideration of alternatives to restoration. Section 21.84.130 sets the standards for that showing and does not confine the determination to the Director of Planning. Rather, in order to approve the Combined Development Permit under the circumstances of this application, the Planning Commission would have had to find that "restoration would endanger the public health or safety or that restoration is unfeasible due to circumstances beyond the control of the applicant or the property owner." The Planning Commission found that the evidence did not support these findings. Accordingly, the Planning Commission did not approve the permit. Regardless of whether it is the Planning Commission or Director of Planning who ultimately "orders" the restoration, the Planning Commission acted well within its authority in determining whether alternatives to restoration could be considered, and the end result is that restoration is required.

County Staff prepared an IS/ND and staff report which would have allowed the approval of an after-the-fact permit, but the Planning Commission, as the Authority given responsibility to act on these action by the County Code, voted 10-0 that that an after-the-fact permit is not appropriate, and that restoration is the correct action to resolve this violation.

d) The appellant contends that information contained in Evidence 5 (Tree Removal) is not supported by the Evidence for the following because the project included the removal of 39 total trees, and the staff concluded that "removal of 39 total trees can be considered to the minimum required under the circumstances" and no evidence to the contrary was submitted.

Response:
The analysis presented with the January 28, 2015 (page 3, paragraph 2, line 3-5) stated: "However, with the trees already removed it is difficult to determine if the number of trees removed was the minimum required for removal." Furthermore, the discussion later states (page 3, paragraph 5, lines 6-9): "Due to the fact that the trees were removed without proper permits, it is impossible to determine the previous health/condition of those tree specimens. Therefore it is difficult to determine how many trees were removed as part of the grading (cut and fill areas)."

This evidence and analysis was presented to the Planning Commission for consideration. It is true that the initial staff recommendation was for approval of the Combined Development Permit, and the initial resolution did conclude that the trees removed can be considered to be the minimum required under the circumstance. However, the Planning Commission had discretion to weigh the evidence and make its own determination. After considering all the evidence presented, the Planning Commission did not concur with staff the recommendation, and rejected the initial draft resolution.

A recommendation by staff does not lock the hearing authority into one set decision point. In this particular case, the Planning Commission found that the complete (clear-cut) removal of 39 protected tree specimens (Oaks and Monterey Pine) was not the minimum tree removal required to allow potential development on site. Therefore, without being able to make the required tree removal finding (minimum tree removal required for the circumstance), the Planning Commission was unable to approve the requested tree removal permit (Use Permits); and subsequently directed staff to return with a resolution for denial.

e) The staff report overstates the number of trees for which a permit is required prior to removal. The appellant contends that the correct number is 21 Oaks, and no permit is required for the removal of Monterey Pines. The appellant acknowledges that Monterey County Code Section 21.64.260 (Preservation of oak and other protected trees) requires a Use Permit for the removal of protected trees, however argues that only Oak trees are protected by this section. Additionally, the appellant contends that although the removal of Monterey Pines is "discouraged" by Policy GMP 3.5 in the 2010 General Plan, Greater Monterey Peninsula Area Plan, this policy does not prohibit the removal of Monterey Pines.

Response:
Monterey County Code, Section 21.64.260 (Preservation of Oak and other protected trees) provides guidelines for the protection and preservation of oaks and other specific types of trees as required in the Monterey County General Plan, area plans, and master

plans (Underline added). Greater Monterey Peninsula Area Plan, a part of the 2010 General Plan, Policy GMP-3.5 states:

> "Removal of healthy, native oak, Monterey Pine, and redwood trees in the Greater Monterey Peninsula Planning Area shall be discouraged (underline added). An ordinance shall be developed to identify required procedures for removal of these trees. Said ordinance shall take into account fuel modification needed for fire prevention in the vicinity of structures and shall include:
>
> a. Permit requirements
> b. Replacement Criteria
> c. Exceptions for emergencies and governmental agencies."

While Policy GMP-3.5 does not specifically state that Monterey Pines shall not be removed, it does state that removal of this tree species shall be discouraged, and groups Monterey Pines into the same protection status as Oaks. Thus Monterey Pines also have a protected status under County regulations.

Additionally, the requirement for the development of an ordinance to allow removal of Monterey Pines again implies that Monterey Pines are to be considered a protected tree species, and removal shall be regulated subject to issuance of appropriate permits. In the absence of a new ordinance, 1) the General Plan policy is used as guidance relative to protection of Monterey Pines; and 2) the existing ordinance, which is not inconsistent with the General Plan, is used relative to protection of Oaks Trees.

f) At the same January 28, 2015 Planning Commission hearing, during a hearing on another matter (Monterey Peninsula County Club-PLN140077 and PLN140432), the Planning Commission was told specifically that Monterey Pines are not protected outside of the Coastal Zone. This particular hearing followed the Flores hearing.

Response:
Another project involving tree removal (Monterey Pines) was presented to the Planning Commission on the same day, January 28, 2015. Additionally, during the other hearing a staff planner did make a statement regarding the protection status of the Monterey Pines outside of the Coastal Zone, and within the Greater Monterey Peninsula Area Plan (GMPAP). The statement made during the subsequent hearing regarding an "unprotected" status of the Monterey Pines with the GMPAP was incorrect.

See discussion above under contention (e) for the protection status of Monterey Pines.

Contention 2 – The Decision was Contrary to Law.
The appellant checked the box on the appeal form denoting that a reason for the appeal was that the decision was contrary to law. However, no evidence demonstrating that the Planning Commission decision was made contrary to law was presented as part of the appeal.

Response:
No Staff response required.

Staff Request/Recommendation

Staff is requesting that the Board of Supervisors consider the facts of the case, the actions of the Planning Commission, and take on the following actions:

a. Consider the appellant's request for continuance and continue the public hearing to May 5, 2015; or
b. If the continuance request is not granted, conduct a public hearing on the appeal, provide direction to staff on the intent of the Board of Supervisors, and continue the public hearing to May 5, 2015.